



University of Arkansas at Little Rock Law Review

Volume 16 | Issue 2

Article 2

1994

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Recommended Citation

Samuel A. Perroni and Janey McNutt, *Criminal Contingency Fee Agreements: How Fair Are They?*, 16 U. ARK. LITTLE ROCK L. REV. 211 (1994).

Available at: <https://lawrepository.ualr.edu/lawreview/vol16/iss2/2>

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CRIMINAL CONTINGENCY FEE AGREEMENTS: HOW FAIR ARE THEY?

Samuel A. Perroni* and Mona J. McNutt**

Not only [are] notorious criminals escaping substantial punishment after long and arduous government efforts to put them behind bars, but substantial harm [is] being done to the truth-seeking process, which is supposed to be one of the principal arms of the criminal justice system. Convicted criminals [are] being used to breed other criminal convictions, with *none* of the criminals receiving substantial punishment as long as they [can] contribute to enlarging the "body count." (The body count here, of course, is at least as misleading as that provided by General William Westmoreland's staff in Vietnam, since the bodies are not really down and out after conviction. They rise from their ashes as federal witnesses.)¹

It is now commonplace for a prosecutor to coax or arm-twist an otherwise reluctant witness into testifying for the government through use of some form of contingency agreement. These agreements are as varied as the factual scenarios in which they are drafted and often include a combination of inducements designed to encourage the witness to testify favorably for the Government. A prosecutor may promise dismissal of the most serious pending charges, immunity from prosecution, monetary payment, or the return of forfeited property. She may offer reduction of an offense to a lesser included one with a less severe penalty or promise to recommend probation or a reduced sentence. She might agree to forego prosecuting the witness's family members in exchange for cooperation, and, most importantly, testimony.

This Article focuses on the constitutionality of contingency fee agreements in criminal cases in light of the inherent dangers such agreements pose to the integrity of the judicial system. Do agreements conditioned upon performance deemed satisfactory by the prosecution and the sentencing court subject witnesses to such enormous pressures

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1. Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 824 n.139 (1987) (quoting Silvergate, *Brief Cases*, Boston Phoenix, Sept. 3, 1985, at 3).

to gain their freedom or the promised benefits that perjury is likely to occur? If so, may the court admit testimony stemming from these agreements without abrogating its duty to zealously guard a criminal defendant's absolute right to due process of law? This article explores relevant case law in an effort to expose the unfairness and unreliability of testimony generated by offers of reward, leniency, and freedom.

I. HISTORY OF CONTINGENT FEE TESTIMONY

Early common law sanctioned a practice, known as "approval," under which accused felons could be pardoned by testifying against an accomplice who was then convicted.² This doctrine was abandoned in the 1500s as courts began to recognize that the likelihood of perjury was enormous when a witness could only escape execution by providing testimony sufficient to convict an alleged accomplice.³ Later, a similar practice, known as "turning king's evidence,"⁴ evolved to encourage reluctant witnesses to testify against their alleged cohorts. Those who turned king's evidence were eligible for pardon simply by providing full and truthful testimony, regardless of whether a conviction resulted. American jurisprudence incorporated and eventually expanded this English tradition to encompass the myriad of leniency agreements now used by prosecutors to obtain beneficial testimony.⁵

Today, prosecutors are given wide latitude in drawing up and entering into agreements with cooperating witnesses on the premise that probative evidence would be otherwise unobtainable.⁶ Presumably, systemic safeguards like the sworn oath or affirmation, the solemnity of the legal proceeding, and perjury and contempt statutes will compel the witness to give complete and truthful answers at trial.⁷ Bargains for immunity or leniency are deemed acceptable as long as the agreement provides that the witness will testify fully and fairly.⁸

2. Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 7 (1992).

3. Neil B. Eisenstadt, Note, *Let's Make a Deal: A Look At United States v. Dailey and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. REV. 749, 761 (1987).

4. *Id.*; King v. United States, 203 F.2d 525, 526 (8th Cir. 1953) (relating historical use of "king's evidence" and concluding that the practice was no longer used).

5. Beeman, *supra* note 1, at 800.

6. Eisenstadt, *supra* note 3, at 764.

7. Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV., 887, 889 (1981) [hereinafter *Duty to Disclose Promises Made to Witnesses*].

8. Cases Noted, *Accomplice Testimony Under Conditional Promise of Im-*

Although courts have long recognized that accomplice testimony is more suspect, and thus of diminished quality,⁹ most courts are unwilling to examine contingency fee agreements closely to determine the witness's perception of performance required under the contract.¹⁰ Contingency fee agreements are generally unobjectionable if the witness is led to believe that he is only required to provide full and fair cooperation and to testify truthfully to the full extent of his knowledge concerning the specific defendants or particular crimes.¹¹ Contingency agreements become constitutionally offensive, however, when a witness believes he must testify in a particular manner to reap the benefits offered.¹² The judiciary is nonetheless reluctant to find that a witness has been impressed to testify in a particular fashion in the absence of direct testimony or specific language to that effect.¹³

One of the earlier cases to consider contingent fee agreements in a criminal context came out of the Fifth Circuit in 1962. In *Williamson v. United States*¹⁴ the court refused to sanction a contingent fee agreement that required the witness to provide evidence against specific individuals concerning inchoate crimes in exchange for a stated bounty for each future defendant.¹⁵ The circuit court

munity, 52 COLUM. L. REV. 138, 139-40 (1952) [hereinafter *Conditional Promise of Immunity*].

9. Eisenstadt, *supra* note 3, at 761.

10. *Conditional Promise of Immunity*, *supra* note 8, at 140.

11. Eisenstadt, *supra* note 3, at 750-51. See, e.g., *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980) (relating that plea agreement would be revoked if witness testified untruthfully); *United States v. Arroyo-Angulo*, 580 F.2d 1137 (2d Cir. 1978) (understanding was that witness would truthfully disclose all information known regarding criminal matter being pursued), *cert. denied*, 439 U.S. 913 (1978).

12. Beeman, *supra* note 1, at 802. See, e.g., *Franklin v. State*, 577 P.2d 860, 862 (Nev. 1978) (holding that where plea bargain tends to lead accomplice to believe testimony must be of a certain fashion, defendant's due process rights are violated); *People v. Medina*, 116 Cal. Rptr. 133, 146 (Cal. 1974) (holding that when prosecution compelled accomplice to testify in a specific manner defendant was denied a fair trial); *People v. Green*, 228 P.2d 867, 871 (Cal. Dist. Ct. App. 1951) (holding that conditional immunity tainted testimony beyond redemption).

13. In *United States v. Vida*, 370 F.2d 759 (6th Cir. 1966), *cert. denied*, 387 U.S. 910 (1967), the court refused to accept the argument that postponing a witness's sentencing until after he testified at the defendant's trial violated the defendant's rights of due process and fair treatment. *Id.* at 767. Instead, citing a string of cases to support its conclusion that this prosecutorial arrangement was acceptable, the court stated, "the fact that a witness hopes or expects that he will secure a mitigation of his own punishment by testifying on behalf of the prosecution does not disqualify him." *Id.* at 767-68.

The question then becomes can one testify on behalf of the prosecution in a criminal case without incriminating the defendant charged therein, and if so, how could the testimony be considered of benefit to the prosecutor.

14. 311 F.2d 441 (5th Cir. 1962), *overruled by* *United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987).

15. *Id.* at 444.

found this bounty hunter arrangement reprehensible because of the obvious opportunities for abuse¹⁶ and reversed the conviction.¹⁷

Conversely, the Eighth Circuit Court of Appeals reasoned in *United States v. Librach*¹⁸ that testimony from an accomplice who was receiving support payments from the Government was properly admitted. Although the Government witness was given immunity from prosecution as well,¹⁹ the court did not consider this combination of benefits problematic.²⁰

The 1980s produced a barrage of decisions regarding contingent fee testimony as prosecutors began utilizing contingency fee agreements more frequently and more innovatively.²¹ In 1981 the Eighth Circuit upheld a contingent fee agreement in *United States v. Winter*²² in spite of language which would seem to indicate that the court believed the primary Government witness, Anthony Ciulla, committed perjury.²³ The court considered Ciulla's testimony "vital to the Government's case . . .,"²⁴ but declined to reverse the convictions resulting from his testimony which was given under promise of immunity from prosecution, leniency of sentencing in state court, relocation

16. *Id.*

17. *Id.* at 445.

18. 536 F.2d 1228 (8th Cir. 1976), *cert. denied*, 429 U.S. 939 (1976).

19. *Id.* at 1230.

20. *Id.* The Eighth Circuit Court of Appeals concluded that the Executive Branch was vested with sole authority to determine whether to prosecute, and the decision would not be reviewed in the absence of a clear abuse of discretion. *Id.* Because the support payments were authorized and used for protective custody, the court saw no basis to infer that the Government had purchased the witness's testimony. *Id.* at 1231.

21. *See, e.g.*, *United States v. Fallon*, 776 F.2d 727 (7th Cir. 1985); *United States v. Kimble*, 719 F.2d 1253 (5th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1983); *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983); *United States v. McGaghren*, 666 F.2d 1227 (8th Cir. 1981).

22. 663 F.2d 1120 (8th Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983).

23. *Id.* at 1127. The court observed that "[o]ne of the few subjects on which the appellants and the Government agree is that the testimony of Anthony Ciulla was absolutely vital to the case. Testifying under an informal grant of immunity, Ciulla described in detail a scheme that—not surprisingly—neatly dovetailed with the indictment." *Id.*

The court also concluded that:

The Government established by direct examination . . . that Ciulla was a liar, a cheat, and a convicted race-fixer who handed out not only money, but also cocaine and hashish, as bribes. . . . During cross-examination, Ciulla was forced to admit that his story on direct was filled with a very large number of minor inaccuracies. Several of the defendants also introduced, or discovered through cross-examination of Ciulla, evidence that directly contradicted his testimony.

Id. at 1132.

24. *Id.* at 1127, 1132.

of him and his family, and federal subsidy payments.²⁵ Instead, the Eighth Circuit took refuge in its conclusion that “[d]espite the apparent holes in his testimony, the jury chose to believe Anthony Ciulla. This was their prerogative, and the case was properly submitted to them.”²⁶

The United States District Court for the Southern District of Texas, however, rejected the questionable testimony of an alleged co-conspirator in *United States v. Baresh*²⁷ upon concluding that “the largess of the prosecution’s benevolence to Quiroga placed far more stress upon his veracity (though buttressed by the government’s requirement of truthfulness) than its gossamer frailness could withstand.”²⁸ The witness, Quiroga, agreed to provide evidence against the defendants concerning past acts and anticipated future acts which would suffice for arrest and indictment.²⁹ In exchange, he was promised dismissal of pending charges, immunity, exemption from fines or forfeitures, reduction of bond, use of his property without threat of seizure, and release of a prior lien on his property.³⁰ If, however, Quiroga testified fully and truthfully but insufficiently for purposes of indictment, he would receive none of the proffered benefits.³¹ The circumstances, coupled with the lack of documentation to support Quiroga’s testimony, convinced the court that admission of Quiroga’s testimony violated due process of law.³² The court

25. *Id.* at 1133.

26. *Id.* at 1132.

27. 595 F. Supp. 1132 (S.D. Tex. 1984).

28. *Id.* at 1135.

29. *Id.* at 1134.

30. *Id.* There was a taped transcript of a conversation between Quiroga and the prosecutor in which the prosecutor stated:

[I]f you are able to provide information and the assistance that results in the arrest and indictment of Jorge Ubeda and Bill Satterwhite . . . then Mr. Holmes has authorized me to dismiss your case. Like you never got in any trouble. [sic] . . . If your assistance and if the information that you give these officers results in the arrest and indictment of Jorge Ubeda, and the seizure of a large shipment of marijuana coming in on a boat, but you can’t do Bill Satterwhite, I don’t care how hard you work at it, and everything, but for one reason or another we cannot arrest or indict him for anything, then what I have told Ms. Akins and what I’m telling you is that you are starting at 15 years in the pen (and the things that you are charged with, if you are found guilty, then the least you can get is 15 years in the penitentiary, the most you can get is 99 or life).

Id. at 1134 n.2. While the court said that a written agreement also provided for Quiroga to offer evidence against these individuals as to both past and future events, the written plea agreement was not set out in the opinion. *Id.* at 1134. Undoubtedly, the prosecution was more circumspect in its use of written language than it was in conversation.

31. *Id.*

32. *Id.* at 1135-37.

concluded that the government agents were so obsessed with indicting specific defendants that they "created a situation which was indeed an invitation to Quiroga to commit perjury."³³

The Eighth Circuit also found an "invitation to perjury" in *United States v. Waterman*³⁴ in 1984, but the opinion was subsequently vacated *en banc* by a six member court that was split evenly as to the constitutionality of the plea bargain.³⁵ In *Waterman*, the Government agreed to recommend a two-year reduction of the witness's sentence if his testimony led to further indictments. If there were no resulting indictments, the Government would not recommend sentence reduction, but would inform the court of the witness's cooperation.³⁶ The Eighth Circuit panel asked whether it is fair procedure "to reward those who testify for the government contingent upon the content and results of their testimony,"³⁷ and answered emphatically that it is not.³⁸

One year after *Waterman* was decided, the Eighth Circuit looked again at contingent fee agreements in *United States v. Bonadonna*,³⁹

33. *Id.* at 1137. After condemning the testimony offered under the agreement, the court then made a very troubling statement: "Contingent agreements similar to the one in issue are proper under compelling justifications and circumstances . . . which are absent here." *Id.* These writers cannot conjure up any set of circumstances that could, in their opinion, justify use of such an agreement.

34. 732 F.2d 1527, 1531 (8th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985).

35. *Id.* at 1533. *Waterman* has a remarkable procedural history. The Eighth Circuit failed to resolve the defendant's contention that the Government entered into an unconstitutional agreement with the chief witness against him. *United States v. Waterman*, 716 F.2d 482 (8th Cir. 1983) (*Waterman II*). The court denied a petition for rehearing. *Id.* The defendant later filed a habeas petition, and the district court found the plea agreement constitutional. On appeal, on original consideration the Eighth Circuit reversed. *United States v. Waterman*, 732 F.2d 1527 (8th Cir. 1984) (*Waterman III*).

On later consideration by the court *en banc*, the district court's judgment was affirmed by an evenly divided six member panel. 732 F.2d at 1533. Chief Judge Lay was unable to participate in the vote. *Id.* Interestingly, Judge Lay voted in the *Waterman III* panel decision to reverse the defendant's conviction because of the agreement. Thus, the constitutionality of contingency fee agreements remains a viable issue in the Eighth Circuit, at least theoretically.

36. *Waterman*, 732 F.2d at 1530.

37. *Id.* at 1531.

38. *Id.* at 1532-33. The Eighth Circuit reasoned:

More fundamentally, however, we see no place in due process law for positioning the jury to weed out the seeds of untruth planted by the government. Certainly Gamst might have lied regardless of the contingency agreement and the jury was generally commissioned to determine the truth of his testimony; but that is no reason for the government to give him further incentive to selectively remember past events in a manner favorable to the indictment or conviction of others.

Id. at 1532.

39. 775 F.2d 949 (8th Cir. 1985).

and distinguished the plea agreement under consideration from the one employed in *Waterman*.⁴⁰ The Government agreed to recommend a sentence of less than five years if its "subjective evaluation . . . of the nature and scope of Mr. Litsky's cooperation" supported such a recommendation.⁴¹ Judge Harper found it dispositive that the jury verdict would not influence the Government's recommendation regarding sentencing.⁴² In doing so, the court evaded the defendant's argument that the Government's recommendation would depend upon Litsky's ability to testify against the defendant in an incriminating manner.

In *United States v. Dailey*⁴³ the First Circuit was also unwilling to view a promise of leniency in sentencing as a contingent reward for incriminating testimony.⁴⁴ The plea agreements in *Dailey* promised the witnesses a sentence of not more than twenty years for full cooperation and a sentence of thirty-five years in the absence of full cooperation.⁴⁵ In addition, there was a third sentencing option—the Government could recommend a ten year sentence, in its sole discretion.⁴⁶ The district court concluded that if full cooperation merited a twenty year sentence, then something more, such as a conviction of the defendant, was required to qualify for a ten year

40. *Id.* at 956.

41. *Id.*

42. *Id.* Judge Harper decided that:

A jury's acquittal could not have jeopardized Litsky's reward, while a guilty verdict did not insure a stronger recommendation from the government. In other words, Litsky had no stake in the outcome of the litigation. Thus, even if the defendant can find legal support in *Waterman*, factually Litsky's plea agreement differs from the one in that case.

Id.

The agreement read as follows:

The United States Government will make known to any sentencing court, or parole board, the nature and extent of Mr. Litsky's cooperation and its value to the Government . . . [T]he recommendation of the government concerning [Litsky's] incarceration at time of sentencing may be less than five (5) years based upon a subjective evaluation by the Government of the nature and scope of Mr. Litsky's cooperation.

Id.

The court, making no mention of the fact that the court in *Waterman* was equally divided, also relied upon the decision in that earlier case in affirming the district court decision. *Id.*

43. 759 F.2d 192 (1st Cir. 1985).

44. *Id.* at 197. "[N]o promised benefit is made contingent upon a resulting indictment or conviction." *Id.*

45. *Id.* at 194-95.

46. *Id.* at 194. The agreements provided that this third option depended primarily upon "the value to the Government of the defendant's cooperation." *Id.*

sentence; therefore, the agreement created "such an inducement to lie" that the testimony had to be excluded.⁴⁷ The First Circuit, however, refused to attach any significance to the ten year provision or directly address the issues raised by the district court. Instead, the court reasoned that traditional safeguards, such as cross-examination, were sufficient, and the testimony was admissible despite the agreement.⁴⁸ The court considered it significant that while the agreements provided "some inducement to lie or to embellish the facts,"⁴⁹ the inducement did not appear "significantly greater in degree or more sinister in quality than the inducements created by agreements that have passed judicial muster in the past."⁵⁰

The Seventh Circuit, in *United States v. Fallon*,⁵¹ employed the same rationale and ruled that a plea agreement and testimony related thereto were not violative of due process because of procedural safeguards, such as jury instructions, disclosure of the agreement at trial, and cross-examination.⁵² The *Fallon* decision implied that the Seventh Circuit would be reluctant to exclude testimony under a plea agreement, regardless of the inducements offered by the Government or their coercive potential.⁵³ Huebner, the Government witness, entered into a performance agreement with the prosecutor that indicated the three charges against him would be delayed until after he had completely cooperated.⁵⁴ If his cooperation materialized as represented, the Government would recommend that he not be incarcerated⁵⁵ and would perhaps bring less than three charges.⁵⁶ The court cited a series of cases upholding plea agreements and chose to leave the terms of the plea agreements to the discretion of prosecutors and the procedural safeguards presently in place.⁵⁷

47. *Id.* at 195.

48. *Id.* at 196, 200. The First Circuit also noted "the coercive potential of these plea agreements" and stated that it shared the "concern and uneasiness" of the district court, but believed the defendant's rights were adequately protected. *Id.* at 196.

49. *Id.* at 197.

50. *Id.* at 197-98.

51. 776 F.2d 727 (7th Cir. 1985).

52. *Id.* at 734.

53. *Id.* at 733-35. The court stated: "[This informer], perhaps even more than most informers, may have had motive to lie. But it does not follow that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissible." *Id.* at 734 (quoting *Hoffa v. United States*, 385 U.S. 293, 311 (1966)).

54. *Fallon*, 776 F.2d at 733.

55. *Id.*

56. *Id.*

57. *Id.* at 734-35.

The Fifth Circuit in *United States v. Cervantes-Pacheco*,⁵⁸ however, found a contingent fee agreement unacceptably coercive, and ruled that the witness's testimony should have been excluded because it was "inherently untrustworthy."⁵⁹ The witness testified that he was paid to infiltrate, gather information, and testify.⁶⁰ Moreover, the amount of pay, if any, the witness received for a case was not determined until he testified at the trial and his performance was evaluated.⁶¹ The court reasoned that this type of agreement is completely unacceptable in our judicial system because:

[O]ne of the basics of our jurisprudence is the search for truth, and by this is meant not the purchased truth, the bartered-for truth, but the unvarnished truth that comes from the lips of a man who is known for his integrity. . . . The government in its prosecutorial efforts should be like Caesar's wife, above or beyond reproach. . . . It may be that we must live with informers. It may be that we must live with bargained-for pleas of guilty. But we do not have to give a receipt stamped "paid in full for your damaging testimony" or "you will be paid according to how well you can convince the jury even though it be in the face of lies."⁶²

In the 1980s, the Eighth Circuit upheld use of testimony under assorted contingent fee arrangements in a number of decisions.⁶³ In *United States v. Risken*,⁶⁴ the Eighth Circuit found no due process

58. 800 F.2d 452 (5th Cir. 1986), *reconsidered*, *United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987).

59. *Cervantes-Pacheco*, 800 F.2d at 460.

60. *Id.* at 458. Informant Kelly testified that the amount he received for a job depended upon "the way they feel I testified or the way they feel about my infiltrating, gather information, [sic], report that information [sic], and testify [sic]." *Id.*

61. *Id.* at 458, 460-61. The court noted that the precedents were "timid in their approach to this problem, fearful that somehow the condemnation of contingent fee arrangements will destroy our criminal justice system." *Id.* at 461. Judge Goldberg declared that "[t]he time has come to announce boldly and firmly that our juridicial search for the truth cannot be reconciled with the virtual purchase of perjury." *Id.*

62. *Id.* at 460-61.

63. *See, e.g.*, *United States v. Janis*, 831 F.2d 773 (8th Cir. 1987) (holding that testimony was not inadmissible because of agreement to provide monetary compensation and to waive prosecution), *cert. denied*, 484 U.S. 1073 (1988); *United States v. Spector*, 793 F.2d 932 (8th Cir. 1986) (holding that testimony was admissible despite anticipated receipt of \$1,000 if testimony led to conviction), *cert. denied*, 479 U.S. 1031 (1987); *United States v. Risken*, 788 F.2d 1361 (8th Cir. 1986) (holding that it was not reversible error for Government to have implied agreement of bonus for witness if defendant convicted), *cert. denied*, 479 U.S. 923 (1986).

64. 788 F.2d 1361 (8th Cir. 1986).

violation despite an implied agreement that the Government witness would receive a bonus if the defendant was convicted.⁶⁵

Astonishingly, the Eleventh Circuit recently found no due process violation when the contingency fee witnesses expected to receive rewards in the millions of dollars for their testimony and other assistance. The case, *United States v. Wilson*,⁶⁶ involved Government witnesses who were granted immunity in exchange for testimony and cooperation.⁶⁷ In addition, one witness testified that he understood that his potential reward for assisting the Government and testifying could also include a monetary reward of as much as eleven million dollars.⁶⁸ The court decided that this potential reward must be likened to "other, long-accepted means" used by the Government to obtain favorable testimony and which were found to comport with due process.⁶⁹ Thus, the court reasoned that the determinative question was not whether the witness would be inclined to testify as the Government wished, but whether the jury was prevented from adequately assessing credibility.⁷⁰ Judge Rubin stated that the amount of the potential rewards did not deprive the defendant of his rights to a fair trial under the Due Process Clause of the Constitution.⁷¹

II. CONTINGENCY FEE AGREEMENTS CONFLICT WITH BRIBERY STATUTES

Both federal and state law prohibit bribery and threatening of witnesses in relation to judicial proceedings.⁷² Presumably, these

65. *Id.* at 1373. After evaluating his testimony, the Government gave the witness an additional \$5,000 premium. *Id.*

66. 904 F.2d 656, 660 (11th Cir. 1990).

67. *Id.* at 657.

68. *Id.* at 658. The Government did not affirm or dispute this testimony. *Id.*

69. *Id.* at 660.

70. *Id.*

71. *Id.* The court decided that the rewards only went to credibility, not constitutionality. *Id.*

72. 18 U.S.C. § 201 (1988) provides in pertinent part:

Whoever . . .

directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom . . . shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

E.g., Ark. Code Ann. § 5-53-108 (Michie 1993) provides in pertinent part:

(a) A person commits witness bribery if:

(1) He offers, confers, or agrees to confer any benefit upon a witness or

statutes were enacted to preserve the integrity of the judicial system and its truth-seeking process. The ends of justice are best served when a witness testifies from personal knowledge and perception, rather than from an incentive to please a party or a party's counsel.⁷³ Thus, no criminal defense counsel could effectively argue that he and his client are somehow exempt from the operation of these statutes.

On the other hand, it has long been accepted in the American judicial system that prosecutors can offer incentives and rewards to witnesses for the purpose of gaining beneficial testimony.⁷⁴ Is justice being served by this prosecutorial exemption from bribery statutes that are otherwise universally applicable? Are prosecutors abusing this grant of discretion to obtain sought-after testimony?

The disparity in the application of bribery provisions stems from society's belief that the prosecution is motivated by a higher calling—the promotion of justice.⁷⁵ It is believed that the defendant, however,

a person he believes may be called as a witness with the purpose of:

(A) Influencing the testimony of that person . . .

...

(b) Witness bribery is a Class C felony.

E.g., Ark. Code Ann. § 5-53-109 (Michie 1993) provides in pertinent part:

(a) A person commits the offense of intimidating a witness if he threatens a witness or a person he believes may be called as a witness with the purpose of:

(1) Influencing the testimony of that person . . .

...

(b) Intimidating a witness is a Class C felony.

E.g., Ark. Code Ann. § 5-53-110 (Michie 1993) provides in pertinent part:

(a) A person commits the offense of tampering if, believing that an official proceeding or investigation is pending or about to be instituted, he induces or attempts to induce another person to:

(1) Testify or inform falsely . . .

...

(b) Tampering is a Class A misdemeanor.

73. Note, *Duty to Disclose Promises Made to Witnesses*, *supra* note 7, at 887. The American Lawyer's Code of Conduct (ATLA) (1980) Rule 3.10 provides: "[a] lawyer shall not give a witness money or anything of substantial value, or threaten a witness with harm, in order to induce the witness to testify. . . ."

74. Eisenstadt, *supra* note 3, at 762.

75. Eisenstadt, *supra* note 3, at 762. This disparity was born out in *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981), when the Second Circuit rejected the proposition that the prosecution and defense should have equality in power. The court stated:

The prosecution assumes substantial affirmative obligations and accepts numerous restrictions, neither of which are imposed on the defendant. . . .

[I]n the context of criminal investigation and criminal trials, where accuser and accused have inherently different roles, with entirely different powers and rights, equalization is not a sound principle on which to extend any

is intent only upon escaping conviction and punishment.⁷⁶ Therefore, it is reasoned that allowing defendants to procure favorable testimony through promise of reward would invite abuse of the system.⁷⁷ Assuming that this is an apt description, is it appropriate to contrast the prosecutor and the defendant when considering the wisdom of allowing bartered testimony? When witness contingency fee agreements are used, are we not, in reality, pitting one defendant against another defendant? We are dealing with opposing actors in the same production having equal desire to escape punishment. Consequently, the Government witness is equally inclined to fabricate testimony to appear cooperative and, thus, gain favorable treatment for his own criminal transgressions.⁷⁸

III. CONTINGENCY FEE AGREEMENTS PROMOTE PERJURY AND THEREBY DEPRIVE DEFENDANTS OF DUE PROCESS

A promise of favorable treatment in exchange for "cooperative" testimony creates an incentive for perjury.⁷⁹ It is generally in a cooperative witness's best interest to incriminate a defendant in order to shift blame and thus reduce his own culpability, as well as to comply with the conditions of his plea bargain arrangement with the prosecution.⁸⁰ By its own analysis, the Supreme Court has recognized the strong inducement for perjury that flows from use of plea agreements.⁸¹ As the Court observed in *Washington v. Texas*,⁸² "[t]o think that criminals will lie to save their fellows but not to

particular procedural device.

Id. at 774-75. *But see* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036-37 (1975) ("We are unlikely ever to know how effectively the adversary technique would work toward truth if that were the objective of the contestants. . . . The business of the advocate, simply stated, is to win if possible without violating the law. . . . His is not the search for truth as such.")

76. Eisenstadt, *supra* note 3, at 762.

77. Eisenstadt, *supra* note 3, at 762.

78. *See Note, Duty to Disclose Promises Made to Witnesses, supra* note 7, at 890. "Despite their lofty, truth-seeking rationale, promises of favorable treatment directly premised on 'cooperative' testimony create a clear incentive for falsification. The witness has a compelling motive to give testimony harmful to the defendant. If the truth will not suffice, he will be inclined to fabricate." *Id.*

79. *Duty to Disclose Promises Made to Witnesses, supra* note 7, at 890.

80. *Duty to Disclose Promises Made to Witnesses, supra* note 7, at 890.

81. *See Washington v. Texas*, 388 U.S. 14, 22-23 (1967) ("[C]ommon sense would suggest that [the government witness] often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing.")

82. 388 U.S. 14 (1967).

obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large.”⁸³

Lower courts are equally aware of the coercive effect that contingent agreements have upon witness testimony.⁸⁴ The Sixth Circuit noted in *United States v. Grimes*:⁸⁵

Although it is true that the informant working under [a contingent fee arrangement] may be prone to lie and manufacture crimes, he is no more likely to commit these wrongs than witnesses acting for other, more common reasons. Frequently, for example, one co-defendant testifies against another co-defendant with the expectation of favorable treatment as a reward for his testimony. Like the informant being paid on a contingent fee basis, a co-defendant so testifying may feel it imperative to obtain a conviction of his co-defendant in order to improve his own position. Similarly, informants paid on bases other than a contingent arrangement may feel that their employment will be terminated if they do not bring about a conviction. Therefore, despite admonitions to the contrary, they may believe that their future employment as an informant depends on the manufacture of crimes in order to prove their worth to the government. Neither of these methods of ‘paying’ informers has been seriously attacked by the courts; yet the potential for abuse is obvious in each case.⁸⁶

While the potential for perjury and abuse is present any time the government “pays” for testimony, common sense leads to the inescapable conclusion that the greater the perceived benefit, the greater the likelihood of perjury.⁸⁷ While both traditional plea agreements and contingent fee agreements involve reward, those agreements which include leniency, immunity, large monetary benefits, or a combination of inducements are most troublesome.

Furthermore, the witness’s perception of what the prosecutor wishes to hear will affect the content of the particular testimony he

83. *Id.* at 22-23.

84. All plea agreements provide incentives for the witness to testify in a manner which pleases the prosecution. *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); *See also United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980) (“[P]romises of immunity or leniency premised on cooperation in a particular case may provide a strong inducement to falsify in that case.”); *DuBose v. LeFevre*, 619 F.2d 973, 979 (2d Cir. 1980) (stating that agreements create incentives for witnesses to testify favorably for prosecution).

85. 438 F.2d 391 (6th Cir. 1971), *cert. denied*, 402 U.S. 989 (1971).

86. *Grimes*, 438 F.2d at 395-96.

87. *Beeman*, *supra* note 1, at 820.

provides.⁸⁸ Witnesses interpret "full cooperation" differently. Some will provide truthful testimony while others will embellish and falsify the testimony to ensure favorable treatment.⁸⁹ A vague or tentative promise to show leniency toward the witness may increase the witness's impression that he will only receive help from the Government if his testimony is particularly damaging to the defendant.⁹⁰ As one commentator observed:

The prosecutor, or his agent, discovered the eyewitness, the glass covered with fingerprints, and the evidence reflected in the police report. These items existed independently of the prosecutor's initiative. A promise of favorable treatment, however, exists only because of the prosecutor's deliberate action. The prosecutor, taking advantage of a power conferred on him but denied to the defendant, has himself provided a motive to lie.⁹¹

There is an assumption that prosecutors will subordinate their zeal for convictions to their higher calling—the pursuit of justice.⁹² Hence, prosecutors have been given broad discretion in the use of plea agreements.⁹³ This prosecutorial discretion is limited, however, by the fundamental rights guaranteed to each citizen through the United States Constitution.⁹⁴ The ultimate responsibility for curtailing abuses of prosecutorial discretion which violate constitutional rights lies with the judiciary.⁹⁵

One of the fundamental rights endowed by the Constitution is the right to due process of law. Both the Fifth and Fourteenth

88. Beeman, *supra* note 1, at 820.

89. Beeman, *supra* note 1, at 820.

90. See Boone v. Paderick, 541 F.2d 447, 451 (4th Cir. 1976) (observing that the more uncertain the agreement, the greater the incentive to say what prosecutor would like to hear).

91. *Duty to Disclose Promises Made to Witnesses*, *supra* note 7, at 895.

92. Eisenstadt, *supra* note 3, at 762. See also *United States v. Agurs*, 427 U.S. 97, 110-11 (1976) (quoting *Burger v. United States*, 295 U.S. 78, 88 (1935)); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (stating that it is the duty of prosecutors to "seek justice, not merely to convict").

93. See, e.g., *United States v. Greene*, 697 F.2d 1229, 1235 (5th Cir. 1988), *cert. denied*, 463 U.S. 1210 (1983) (observing that prosecutorial discretion stems from separation of powers doctrine); *United States v. Chagra*, 669 F.2d 241, 247 (5th Cir. 1982), *cert. denied*, 459 U.S. 846 (1982) (noting that the executive branch is empowered by the Constitution to faithfully execute laws); *United States v. Hamm*, 659 F.2d 624, 628 n.13 (5th Cir. 1981) (*en banc*) (stating that courts must balance the constitutional delegation of law enforcement to the executive branch with the constitutional power of the judicial branch and give deference to prosecutorial discretion).

94. *United States v. Mastroianni*, 749 F.2d 900, 911 (1st Cir. 1984).

95. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (holding that Chinese launderers were denied equal protection because singled out for prosecution).

Amendments to the United States Constitution guarantee every defendant the right to a fair trial. Because the Due Process Clause zealously protects the "integrity of the fact-finding process,"⁹⁶ it dictates exclusion of manifestly unreliable evidence.⁹⁷ To promote justice and prevent admission of blatantly suspect testimony, the courts must assume their proper roles as overseers of the process and guardians of the Constitution.

Unfortunately, few courts have been willing to speak out about prosecutorial abuse of discretion in use of contingency fee agreements. The Fifth Circuit stood virtually alone in rejecting agreements that provide strong inducement to fabricate and embellish, and proclaimed boldly on two occasions that it would no longer tolerate contingent agreements which transcend fair play and invite perjury. In *Williamson v. United States*⁹⁸ the court declared, "it becomes the duty of the courts in federal criminal cases to require fair and lawful conduct from federal agents in the furnishing of evidence of crimes."⁹⁹ In a concurring opinion, Judge Brown vigorously denounced prosecutorial use of rewards to obtain incriminating testimony, and reiterated, "[w]hat we hold is that, recognized as is the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough—it is just too much. When that occurs, the law must condemn it as offensive whether the method used is refined or crude, subtle or spectacular."¹⁰⁰

In *United States v. Cervantes-Pacheco*¹⁰¹ the Fifth Circuit rejected a contingency fee arrangement because the court found that the contingent fee agreement provided a strong financial incentive for the witness to commit perjury.¹⁰² The court observed, "[i]t is true that the precedents we cite are timid in their approach to this problem, fearful that somehow the condemnation of contingent fee arrangements will destroy our criminal justice system. If that be true, then our system of finding the truth is pallid and weak and not to be trusted."¹⁰³ *Cervantes-Pacheco*, however, was later reconsidered *en*

96. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (quoting *Berger v. California*, 393 U.S. 314, 315 (1969)).

97. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (holding that due process is violated when government offers testimony prosecutor knows to be false).

98. 311 F.2d 441 (5th Cir. 1962), *overruled by* *United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987).

99. *Id.* at 444.

100. *Id.* at 445 (Brown, John R., concurring).

101. 800 F.2d 452 (5th Cir. 1986), *aff'd*, 826 F.2d 310 (5th Cir. 1987), *cert. denied sub nom.* Nelson v. United States, 484 U.S. 1026 (1988).

102. *Id.* at 460.

103. *Id.* at 461.

banc and the Fifth Circuit watered down this language by holding that contingent fee agreements are not *per se* unconstitutional.¹⁰⁴

The District Court for the Southern District of Texas also found that the contingent fee agreement utilized in *United States v. Baresh*¹⁰⁵ violated due process because it was conducive to perjury.¹⁰⁶ In the same year, 1984, the Eighth Circuit decided *United States v. Waterman*¹⁰⁷ in which the original panel concluded that offering favorable treatment contingent upon testimony resulting in an indictment violated due process.¹⁰⁸ Four of the eight participating judges considered the contingent agreement unconstitutional.¹⁰⁹

The majority of courts, however, have upheld contingent fee agreements, even in the absence of a finding that the testimony offered therewith was trustworthy.¹¹⁰ For example, in *United States v. Winter*¹¹¹ the First Circuit noted: (1) that there were "apparent holes in [the witness's] testimony";¹¹² (2) that it was established on both direct and cross-examination that the witness was a liar;¹¹³ and (3) that "[s]everal of the defendants also introduced, or discovered through cross-examination of [the witness], evidence that directly contradicted his testimony."¹¹⁴ The court, nonetheless, concluded that, given the number of incidents involved and the number of years between the incidents and the trial, errors in memory were not indications that the witness was lying.¹¹⁵

In like fashion, the Fifth Circuit allowed the testimony of a contingent fee witness in *United States v. Kimble*¹¹⁶ who admitted

104. *United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987), *cert. denied sub nom. Nelson v. United States*, 484 U.S. 1026 (1988).

105. 595 F. Supp. 1132 (S.D. Tex. 1984).

106. *Id.* at 1137.

107. 732 F.2d 1527 (8th Cir. 1984), *vacated en banc, cert. denied*, 471 U.S. 1065 (1985).

108. *Id.* at 1531.

109. *Id.* at 1533.

110. *See, e.g., United States v. Kimble*, 719 F.2d 1253, 1255 (5th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984) ("The government's case was based largely on the testimony of Simoneaux. . . . Simoneaux acknowledged that he was dishonorable and that he had repeatedly lied, including lies under oath, to save his own skin."); *United States v. Winter*, 663 F.2d 1120, 1127 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983).

111. 663 F.2d 1120 (1st Cir. 1981).

112. *Id.* at 1132.

113. *Id.*

114. *Id.*

115. *Id.* at 1135. The court also did not find it significant that the lead counsel in the case had signed the contingency agreement with the witness. *Id.*

116. 719 F.2d 1253 (5th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

on the stand: (1) that "he was dishonorable";¹¹⁷ (2) that he had lied on several occasions, including lies under oath, to save himself;¹¹⁸ and (3) that he testified because he would get a lenient sentence if his cooperation was considered acceptable.¹¹⁹ The court decided that certain factors which reflected negatively on the witness's veracity, such as his admission of perjury and of lying in more than thirty statements for self-preservation, went only to the weight of the testimony, not admissibility.¹²⁰

In *United States v. Spector*¹²¹ the Eighth Circuit retreated from its earlier stance in *United States v. Waterman*¹²² by condoning use of a government contingency agreement that made the one in *Waterman* appear meek by comparison.¹²³ The Government not only offered the possibility of immunity to the witness, his family, and his girl friend, but also promised a one thousand dollar bonus if his testimony brought about a conviction.¹²⁴ The Government warned

117. *Id.* at 1255.

118. *Id.*

119. *Id.*

120. *Id.* at 1256-57. Judge Politz reasoned that the defense could remind the jury that the witness was a perjurer who had perjured himself before the Grand Jury in regard to this trial and who was then testifying under a contingency agreement. *Id.* at 1257.

121. 793 F.2d 932 (8th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

122. 732 F.2d 1527 (8th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985). See *supra* notes 107-09 and accompanying text.

123. 793 F.2d at 934. The agreement in *Spector* promised the witness, his family, and girl friend immunity and freedom from prosecution for past crimes if the government found his cooperation satisfactory. The agreement boldly stated:

The Government will carefully and in good faith consider and evaluate [the witness's] cooperation and the information he provides in making its determination whether or not to reduce or forgo [sic] some or all of the aforesaid maximum charges and imprisonment exposure. In short, this Office will review in good faith the extent and value of [the witness's] information and cooperation as it relates to successfully solving and prosecuting crimes. The more important we deem that information and cooperation, the more likely the reduction of charges and his sentencing risk.

Id.

In contrast, the agreement in *Waterman* that four members of the court found violative of due process two years earlier merely provided:

[I]f [the witness's] cooperation in the form of truthful testimony led to further indictments, the government would (1) affirmatively recommend that [the witness's] sentence be reduced by two years, and (2) inform appropriate federal agencies of the fact and extent of [the witness's] cooperation. If, however, [the witness's] testimony did not lead to the indictment of other individuals, then the government would acknowledge and inform the Court of [the witness's] cooperation, but would not specifically recommend any reduction in his sentence.

732 F.2d at 1530.

124. 793 F.2d at 934, 937 n.3.

that the value of the information and cooperation would determine whether the witness received all, some, or none of the benefits.¹²⁵ However, the *Spector* decision may have turned more on the court's view of the correlation between the witness's testimony and the defendant's conviction than on the court's view of the constitutionality of the witness agreement. In *Spector* the court concluded that the witness's testimony was insubstantial;¹²⁶ in *Waterman* the witness's testimony was critical to the verdict.¹²⁷ If so, the court actually rendered a "harmless error" decision disguised as a "due process" one. The decision may nevertheless be cited in the future as support for the constitutionality of this type agreement when the testimony is much more crucial to the verdict.

Furthermore, most courts find it acceptable in cases involving a defendant who has entered into a contingency fee agreement to postpone sentencing hearings until after the witness has testified.¹²⁸ This allows sentencing concessions that are dependent upon the value of the witness's testimony to the Government's case. The length of any applicable sentence is a primary concern to a defendant facing incarceration and the first question raised by a defendant considering a guilty plea. Therefore, withholding sentencing until after the rendition of testimony creates an extremely coercive environment for the plea bargainer and greatly increases the likelihood of perjury.

Moreover, the federal sentencing law was recently changed to allow only the Government to move for a sentence reduction following sentencing. Under Rule 35(b) of the Federal Rules of Criminal Procedure,¹²⁹ the Government may move within a year following sentencing to lower the defendant's sentence to a level below the minimum statutory sentence. Under this provision, the court is prohibited from taking favorable notice of cooperation in the absence of a Government motion to that effect.¹³⁰ This provision serves as an inducement to a witness to provide further incriminating testimony

125. *Id.*

126. *Id.* at 936. The court stated, "[h]owever, Adams' testimony had very little to do with the conviction of Spector." *Id.*

127. 732 F.2d at 1528. The Eighth Circuit stated in *Waterman*, "[b]ecause the testimony given pursuant to this agreement was critical to support Waterman's conviction, we reverse the district court's denial of his section 2255 motion." *Id.*

128. See, e.g., *United States v. Dailey*, 759 F.2d 192 (1st Cir. 1985); *United States v. Kimble*, 719 F.2d 1253 (5th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *United States v. Insana*, 423 F.2d 1165 (2d Cir. 1970), *cert. denied*, 400 U.S. 841 (1970).

129. Rule 35(b) provides:

The court, on motion of the Government made within one year after the imposition of a sentence, may reduce a sentence to reflect a defendant's

even after he has been incarcerated. The potential for conjured testimony to reduce the existing sentence seems abundantly clear.

In addition, the Federal Sentencing Guidelines provide for a reduced sentence under Section 5K1.1 for substantial assistance to the Government.¹³¹ To activate the provision, the Government must move for a reduction. Efforts by the defense alone to obtain benefits for substantial assistance are not rewarded, despite the extent of rendered assistance.¹³² Thus, a defendant must provide testimony that meets Government approval to receive sentencing benefits. This pressures the defendant to produce the type of information that he believes would be deemed "substantial" in the eyes of the Government.¹³³

IV. CONCLUSION

As evidenced by recent case law, courts are becoming increasingly more lenient in allowing testimony under contingency agreements.¹³⁴ Agreements which would likely have been denounced in earlier years are now readily accepted because of decisions relied upon as persuasive, if not precedential authority.¹³⁵ The trend is to allow the prosecution to reach whatever bargain it can and then rely upon institutional safeguards, such as cross-examination and jury instructions, to expose any incidents of perjury generated thereby. This reluctance to censure prosecutorial agreements is defended by reiteration of the "separation of powers" doctrine, although it flies in

subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. . . . The court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

FED. R. CRIM. P. 35(b).

130. See, e.g., *United States v. Reina*, 905 F.2d 638, 640 (2nd Cir. 1990); *United States v. Ortez*, 902 F.2d 61, 64 (D.C. Cir. 1990). But see *United States v. Havener*, 905 F.2d 3, 8 (1st Cir. 1990) (concluding court could consider defendant's cooperation in absence of a motion by government).

131. U.S.S.G. § 5K1.1 & App. C.

132. See, e.g., *United States v. French*, 900 F.2d 1300, 1302 (8th Cir. 1990) ("[T]he District Court, without a motion by the government, had no authority even to consider a downward departure under Section 5K1.1."). In *French* the defendant argued on appeal that he had provided substantial assistance, but was given no reduction under Section 5K1.1. *Id.*

133. Hughes, *supra* note 2, at 44-45.

134. See *supra* notes 63-71 and accompanying text.

135. See *supra* notes 43-50 and accompanying text.

the face of other constitutional provisions that are deserving of equal import and emphasis.

Likewise, the Federal Sentencing Commission, by including the substantial assistance category in Rule 35(b) and section 5K1.1, has shown a propensity to draft around the Constitution.¹³⁶ Nonetheless, the Guideline provisions have been repeatedly declared constitutional by the courts whenever defendants dared to challenge them. Perhaps, as Judge Goldberg concluded in *United States v. Cervantes-Pacheco*,¹³⁷ courts are fearful that the criminal justice system cannot survive without testimony obtained through contingency fee agreements. Considering that contingency agreements are a relatively new device in criminal prosecution, one cannot help but wonder how the system managed to function for centuries without them.

While recognizing that the prosecution does take its obligation to protect the public interest seriously, the courts must also remember that prosecutors are advocates who are first and foremost trained to win. One writer wisely observed, and was bold enough to declare, that the advocate's primary goal may not be to uncover the truth in every case because "the truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time."¹³⁸ As painful as it may be, it is time for the judicial system to deal with reality as it exists rather than with the ideal.

Furthermore, juries should not be left with the task of discerning which pieces of evidence are inherently unreliable. Unreliable evidence is judicially excluded under the hearsay rule and other evidentiary provisions. No one would dare suggest that blatant hearsay should be allowed because the jury can determine its believability or that a procedure for identifying suspects which is highly suggestive should be ignored because the jury can resolve its reliability. Yet, the courts have attempted to deal with testimony offered under unconscionable contingent agreements in that very fashion.

The time has come for the judiciary to once again resume its responsibility of fervently protecting cherished constitutional rights, and if prosecutorial discretion must be limited to achieve that goal, so be it. Limits must be placed on the use of contingency fee agreements, and testimony offered in conjunction with agreements which violate constitutional standards must be excluded as inherently

136. See *supra* notes 129-33 and accompanying text.

137. 800 F.2d 452, 461 (5th Cir. 1986), *aff'd* 826 F.2d 310 (5th Cir. 1987), *cert. denied sub nom.*, *Nelson v. United States*, 484 U.S. 1026 (1988).

138. See Frankel, *supra* note 75, at 1037.

unreliable because of the likelihood of perjury. Moreover, the Government should never be allowed to provide monetary compensation under a cooperation agreement. After all, regardless of the label used, this is tantamount to paying a witness to testify favorably for a party. Anyone who pays a witness to testify is subject to felony indictment under federal bribery statute, and there is no express, statutory exception for prosecutors. The courts have merely chosen to excuse this outrageous misconduct and construe the law as applying to everyone but the Government. The Government, above all others, should follow the letter of the law or our legal system will eventually become a mockery.

Prosecutors should also be barred from dismissing charges against family members of a contingent fee witness. Would-be witnesses are often more concerned about a spouse, mother, or child serving time than they are about their own possible incarceration. A promise to dismiss charges against a family member is, by its very nature, so coercive that testimony derived thereby is suspect.

Courts could set standards that delineate options for the prosecution to include in any given agreement. For example, the court could mandate that prosecutors can offer reduction of a possible sentence to the next level, immunity from prosecution of one charge, or loss of forfeiture on one piece of property. In addition, the prosecution could be allowed to offer any two concessions in exchange for cooperation and testimony, but no more. This would provide some guidance for the prosecution in utilizing contingency fee agreements and stem the flow of ever-increasing combinations of promises to obtain desired testimony. If testimony is then offered under an agreement that does not comport with judicially imposed standards, it should automatically be excluded as unreliable under due process. In the absence of intervention by the courts, it appears likely that the Government will continue to escalate its use of contingency fee agreements, as well as the number and quality of concessions offered thereunder, and due process will become a hollow phrase proclaimed in the classroom and ignored in the courtroom.

